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Global Constitutionalism

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Editorial

The end of ‘the West’ and the future of global constitutionalism

MATTIAS KUMM, JONATHAN HAVERCROFT,
JEFFREY DUNOFF and ANTJE WIENER

I. The collapse of ‘the West’?

A century after the Russian Revolution of 1917 and more than 25 years after the collapse of the Soviet Union and the ‘Eastern Block’, we may now be witnessing the collapse of the American Republic and the Western order it created and led after WWII. Whether NATO, the EU and the string of alliances the United States has built across Asia will continue to exist in three or five years is by no means a foregone conclusion, but it has become an open question.¹ 2016 was the year that Americans elected the populist authoritarian nationalist Donald J Trump as the forty-fifth President of the United States and the British voted in favour of ‘Brexit’. The US/British alliance that underwrote the global order after WWII may well remain an alliance: the first foreign leader the new President received was Theresa May, although only after meeting with Nigel Farage, the United Kingdom Independence Party (UKIP) leader. However, both they and their erstwhile partners in that alliance are now playing a leading role in the unravelling of the order that they built and supported. Thus, Trump has dismissed the United Nations (UN) as a ‘social club’ and threatened to cut down US contributions, originally characterised NATO as obsolete, and stated that he would be neither surprised nor concerned if the European Union (EU) disintegrated. Furthermore he threatens to upend the global trade order, burying the Trans-Pacific Partnership Agreement (TPPA) and ending negotiations surrounding the Transatlantic Trade and Investment Partnership (TTIP), threatening the North American Free Trade Agreement (NAFTA), at least in his pronouncements, showing no indication to take seriously World Trade Organization (WTO) obligations. Meanwhile under

¹ See A-M Slaughter, ‘The Return of Anarchy?’ (2017) 70 *Columbia Journal of International Affairs* 11–16.

the leadership of Prime Minister Theresa May the UK is headed for a ‘hard Brexit’, seeking to cut all formal association with the EU. What is clear is that in the event of an election victory of the National Front’s Marine Le Pen in France in May – a genuine possibility at the time of writing – the survival chances of the EU in its present form would be slim and the post-WWII narrative of a relatively cohesive liberal community of ‘the West’ would have lost all plausibility. Of course, none of us have a crystal ball and even those equipped with the toolbox of scientific polling, we have learnt, are unable to reliably predict political outcomes. It may, therefore, all turn out very differently: in European elections moderate candidates may well keep the upper hand, as was the case in the recent Dutch elections, and a bumbling and incompetent Trump Presidency might come to a quick inglorious end leaving a more conventional hard right Republican establishment in charge, or, even less likely, Trump may be pushed or persuaded to pursue more moderate and internationally engaging positions. But with far right populist authoritarian parties and leaders enjoying considerable successes across Europe and the US even such a less dramatic scenario should not detract from the decay of ‘the West’ as a relatively cohesive geopolitical configuration anchoring a normative model of global order in which commitments to human rights, democracy and the rule of law are central.

Given this state of affairs, what are the implications for the future of Global Constitutionalism? The world and the discipline faces new challenges and the unravelling of ‘the West’ may well lead to all kinds of disruptions of the existing order and undermine any residual plausibility that apologetic status quo embracing liberal progress narratives might have. But Global Constitutionalism as a practice and as a cognitive frame for scholarly inquiry is unlikely to lose its analytical, critical and constructive bite. The end of ‘the West’, if it were to occur, would not imply the end of Global Constitutionalism.

II. Why a demise of ‘the West’ will not lead to a demise of constitutionalism

When the Soviet Union collapsed, it not only brought along with it the collapse of the order it had created and dominated after WWII (the Warsaw Pact, COMECON, and a global empire of client states), it also spelled out the end of Communism as a relevant global ideology. Even in the event of a collapse of the West, there will be no equivalent demise of Western ideology, if that ideology is understood as a commitment to constitutionalism: to pluralist, open liberal constitutional democracies domestically and a global order in which claims relating to human rights,

democracy and the rule of law are asserted, negotiated and contested across different institutional fora and contexts. On the contrary, what will become clearer than ever before is that the relationship between 'the West' and constitutionalism has always been a complicated one and that the category of 'the West' is a Cold War and post-colonial category that today is used primarily by anti-constitutionalist national elites to discredit the emancipatory ambitions of those who they aspire to rule. In that sense the 'the death of the West' may lead to an emancipation from the idea that the idea of constitutionalism should paradigmatically be identified with the practices of the US and the EU.

The demise of constitutionalism and the institutions it has created after WWII is unlikely for three reasons. First, constitutionalist ideals have long taken hold outside of the West. Whether the American constitutional order will survive Trump may be an open question, even if many believe that it will. The fate of constitutionalism in Poland or Hungary hangs in the balance. Furthermore recent empirical studies have found evidence for more general widespread authoritarian backsliding of states that had embraced democracy after 1989. But that tendency is by no means universal. Other constitutional democracies outside of 'the West' may well be going through affirmative constitutional moments. To take just three examples: It is difficult not to read South Korean popular dismay of their corrupt and inept President and the impeachment proceedings before the Constitutional Court as a genuine constitutional moment, a symptom of deepening of constitutionalist sensibilities in South Korea. In Myanmar, following the free and fair elections in late 2015 there has been a first peaceful transition of power from a military to a civil government. In Colombia the ultimately successful deal between the Colombian government and FARC means not only that the constitutional order in Colombia has been stabilised, but that at the time of writing the last armed conflict in South America has been settled peacefully. Perhaps the darkest pessimism is the result of a Western bias. A more complex picture emerges, when taking a genuinely global perspective.

Second, the principled grammar of Global Constitutionalism is hard wired into a dense network of treaties, institutions and practices globally and enjoys the general support of a wide range of stake-holders. If the United States and the West more generally are reluctant to take a leadership role in the progressive evolution of international law, a coalition of other actors may step in. The current negotiations under way in the UN concerning a Nuclear-Weapon Ban Treaty are taking place without any of the major Western powers. It is an open question how effective the current Western boycott will be and whether it can prevent the majority of the international community from establishing a legal prohibition of nuclear weapons, further

stigmatizing these weapons and building momentum towards effective nuclear disarmament. But whatever the case may be, the efforts currently underway show a degree of confidence of non-Western actors as stakeholders and norm-entrepreneurs within the international system – with Brazil, Indonesia, Malaysia, Mexico, Nigeria and South Africa playing a leading role – that until recently would have seemed unimaginable. Furthermore the inertia and resilience of these structures is likely to be considerable, both because they are difficult to change without consensus and because they may well become the focal point of resistance or new strategic positioning. If the US gives up on the institutional infrastructure of global trade, for example, this creates an opportunity for China to position itself as a reliable anchor, partner and leader, as Xi Jinping has tried to do at Davos this year. If populist nationalist authoritarians like Trump seek to undermine open borders and global trade, perhaps that will make it easier to forge coalitions among centre-right and centre-left political actors elsewhere to support deeper trade relations. The election of Trump has, for example, improved the chances for CETA to be ratified by European Member States as a clear statement against nationalist retrenchment. Of course, it will have significant implications that major powers are increasingly led by authoritarian nationalist strongmen – not just in the Transatlantic World, but also in China, Russia and Turkey. There will inevitably be some decay and loss of relevance of international laws, institutions and practices, when powerful actors imagine international relations as zero-sum interactions between powerful leaders, struggling to define and expand their respective spheres of influence. But the story is unlikely to be the demise of Global Constitutionalism, rather than a significantly more complex story in which elements of demise and decay are complemented by resistance, reconfiguration and innovation.

Third, there is no richly-conceptualised alternative ideology with potential global appeal contesting the global constitutionalist grammar. The alternatives that exist take the form of a motley configuration of ideologies and power structures that are unlikely to form the basis of stable new coalitions or significantly expand their appeal, as the following brief analysis of anti-constitutionalist ideologies and the power structures that embrace them seeks to make clear.

III. Constitutionalism and the divided rest: Three kinds of anti-constitutionalist ideologies and powers

It may be helpful to distinguish between three kinds of powers/ideologies. First, there is Islamic Fundamentalism that, in its various forms, is the cause of a terrible internecine civil war within the Islamic world. Here Saudi Arabia and its brand of Wahhabism, Iran and its Shiite Ayatollahs

and various terrorist organisations spread across borders, most obviously ISIS, are central factors. There is no global war between Islam and the West. In a global context Islamic terrorism in Western states appears as a peripheral phenomenon. All of these Islamic groups may imagine themselves as also fighting ‘the West’ or cast the US as the ‘Great Satan’, but they are primarily fighting each other as well as constitutionalist tendencies they connect to the West within the dominantly Muslim world they are part of. In that respect the Nigerian Boko Haram (meaning literally: Western education is prohibited) is no different from the others. ‘The West’ in these ideological struggles is not a geographical category, but refers to powerful tendencies within Muslim majority societies, feeling drawn to the promises of dignity, peace, justice and prosperity they associate with commitments drawn from the liberal constitutionalist world. Referring to these as ‘Western’ is a rhetorical move the purpose of which is to classify these tendencies as culturally alien and inauthentic, rather than as legitimate demands of mostly Muslim fellow citizens claiming their rights.

Second, there are populist nationalist authoritarian movements, parties and leaders that seek to subvert and replace liberal constitutional democracy. In that respect Trump in the US, Hungary’s Orbán, Poland’s Kaczyński, Russia’s Putin, and Turkey’s Erdoğan are ideological partners in crime. Together they present a distinctive counterposition to pluralist constitutional democracy domestically that has been described as ‘illiberal democracy’, ‘guided democracy’ or ‘sovereign democracy’. In their world a free press is all too easily the enemy of the people and needs to be controlled, judges and academics need to be brought in line, and inauthentic elites need to be prevented from following through on their basically treasonous globalist ideologies. Instead of checks and balances provided by intermediary institutions the people are one united by the great leader, who may occasionally seek confirmation in direct referenda. In this context constitutional forms are secondary, their substance is subverted and democracy is celebrated as the will of the real authentic people, constituted by those who support the strong man.

A third group of states, combine authoritarianism and nationalism with ideas of merit-based technocratic government and a greater openness to the world. Here there are not only no constitutional courts, no free press and significant restrictions on academic freedom. There are also no referenda, as the ideal citizen is equated with a docile subject appreciating the performance of welfare enhancing elites. But there is a defence of global trade and global engagement more generally. In China the Communist Party is increasingly justifying its role with reference to its meritocratic features and economic successes, as does the People’s Action Party in Singapore that has always ensured for itself a qualified majority since

Singapore achieved independence. Similarly states like the United Arab Emirates with cities such as Dubai or Abu Dhabi, or Qatar legitimate themselves by reference to their ambitious architectural or cultural projects and general economic and civilizational appeal as global hubs for commerce, transportation or trade. Who needs constitutionalism, if significant successes are possible without it and might even be easier achievable without it?

There may be a thin overlapping consensus committed to protectionism and a transactional power-based conception of foreign relations that a critical group of the more prominent anti-constitutionalists share. If that thin consensus became more widespread or should some other potentially stable hegemonic coalition of these actors emerge, the risks to Global Constitutionalism would be serious. But there is currently little prospect of a stable coalition between these groups of states – religious fundamentalist, nationalist or technocratic – or even groups of states within each category. At the present time, they are united only in their rejection of ‘the West’.

IV. On the relationship between ‘the West’ and ‘constitutionalism’

But it would be a mistake to describe the core plot as ‘the constitutionalist West against the (divided) rest’. What the current crisis in the US and Europe makes clearer than it has ever been in the post-WWII era is that it was always little more than a convenient simplification – either with an apologetic or a critical purpose – to connect a geographical term ‘the West’ with the liberal ideas of the constitutionalist tradition.

The idea of the ‘the West’ was always an ambivalent one. On the one hand it referred to a legal-political ideal: constitutionalist ideas connected to the French and American Revolutions in the eighteenth century. This was the idea of persons as free and equals governing themselves individually, as part of a national community and an international community of states. Since the end of the Cold War in Europe and North America there has been a broad consensus amongst mainstream political parties of both the left and the right that their policy disagreements take place within a shared commitment to some version of a liberal constitutional democracy and a rule-bound international legal order, with its own set of institutions and practices, helping to provide global public goods, organising a global economy and furthering human rights. On the other hand ‘the West’ referred to an alliance and a power configuration. At the core of that power configuration after WWII was the US, NATO and Western Europe and later the extended European Union, along with economic institutional infrastructure – the WTO, the IMF and the World Bank – they dominated. The normative ideal and the power configuration were, in the self-description of those who imagined themselves ‘the West’, supposed to

hang together. The power configuration and alliance was claimed to be grounded in a commitment of principle and endowed with the purpose to defend and empower others to realise these principles. The global constitutional moment after WWII, which saw the establishment of the UN, the Universal Declaration of Human Rights, the war crimes tribunals in Tokyo and Nuremberg as well as the American-initiated constitutional projects in Japan and Germany, seemed to support the identity between 'the West' and the idea of global constitutionalist project, as did the enlargement and deepening of the European Union after end of the Cold War.

But, of course, the relationship between the normative idea and the concrete exercises of power by the US-guided alliance was always more complicated. In the geostrategic competition with the Soviet Union in the Cold War, NATO included among its members the authoritarian regimes in Portugal, Greece and Turkey. In its policies in the Middle East and in South America the US favoured not the regime more closely aligned with constitutionalist principles, but the regime more aligned to its interests and more opposed to the interests of the Soviet Union. Geostrategic considerations more often than not trumped considerations of principle. With the Soviet Union disintegrated, US foreign policy after the end of the Cold War continued to reflect the tensions between the realist pursuit of national interests narrowly (mis)conceived and commitments of principle, perhaps most visible in its aggressive and yet utterly unproductive use of force in the 'War on Terror' in Afghanistan, Iraq, Libya and elsewhere, much of it in violation of international law, or its roguish attempts to undermine the International Criminal Court during the first term of the Bush administration.

Note how this ambivalence allows both actors within the West as well as non-Western powerful groups to immunise themselves from criticism, when their actions are challenged in the name of human rights, democracy or the rule of law.

For politically responsible 'Western' elites being the West and effectively claiming original ownership of these ideals means that anything that is being done is done also in the name of these ideals and is thus presumptively compatible with them. Criticism of Western actions is presumptively the result of a lack of commitment or a lack of understanding of the West's principles. If we are the West and we are all about the right kind of values, then nothing we do can be fundamentally wrong.

On the other hand authoritarian regimes elsewhere found it easy to denounce 'the West' as hypocritical and unprincipled. Was the universalism it espoused not just a particularism with imperial ambitions, as it had been, when European powers colonised the world in the name of Christianity or civilisation? The ideal appeared tainted by the ambivalence and hypocrisy of those who were identified with it and served as its leading advocates. This is

convenient for powerful dominant groups in non-Western societies seeking to immunise themselves from criticism in the name of human rights, democracy and the rule of law. Instead of taking seriously that criticism and justifying their behaviour, criticism is conveniently deflected by engaging in tirades against the hypocritical imperial ‘West’.

What the present crisis in the US and the EU makes clear, is that even in ‘the West’ the commitment to constitutionalism is tenuous and increasingly contested. What makes Trump distinctive are not his xenophobic, racist, protectionist or nationalist policy proposals. What makes him distinctive is that he clearly does not imagine himself as an office holder in a constitutional republic and therefore subject to and constrained by constitutional processes and limitations. He has spoken of ‘the reign’ of Trump and identifies the people with those who support him (‘What is important now is to unite the people. All the other people don’t matter.’). Those who oppose him must be either corrupt or incompetent. There is no space here for legitimate opposition, the separation of powers and the contestatory pluralism characteristic of liberal constitutional democracies.²

Of course, it was always a radical simplification to identify ‘the West’ with a commitment to constitutionalist principles. Yes, the French and the American Revolutions which brought about a re-imagining of law and politics within a constitutionalist paradigm took place in ‘the West’. But the revolutionary ideals did not gain uncontroversial acceptance in much of Europe until very late in the twentieth century. By 1815 with the defeat of Napoleon the revolution and its ideals appeared to have been defeated as reactionary powers established their own order in the Congress of Vienna. As the nineteenth century wore on, various kinds of nationalism supplanted, sometimes allied with, but sometimes opposed ‘the ideas of 1789’. The deep divide in France between those who may be inclined to vote for Marine Le Pen and her Front National and dismantle the EU and those who oppose her reflects a dividing line that has its historical antecedent in the battle lines between the liberal supporters and the opponents of the French Third Republic in the late nineteenth century. The conflict between an authoritarian cultural identity based nationalism and constitutionalist ideals was also dramatically highlighted by a widely circulated and discussed pamphlet signed by intellectuals celebrating the outbreak of WWI in Germany favourably contrasting the nationalist culturalist ideals of 1914 to those of 1789. Contemporary political movements and authoritarian strongmen on the far right in the US and Europe repeat in a remarkably unoriginal way the core tropes of nationalism, sovereignty and identity

² For a penetrating analysis see J-W Müller, *What is Populism?* (University of Pennsylvania Press, Philadelphia, PA, 2016).

that were invoked against liberal constitutionalist ideals of the pre-WWI European world.

The lesson to be drawn from this is simple: We should give up the idea of a deep connection between constitutionalist ideas and geographical regions, countries or power constellations. Perhaps there is no region in the world where the demands of constitutionalism have not at some point fostered resistance and alienation among some who invoke national culture, identity, and sovereignty. Is there anything structurally different from Chinese debates about Confucianism and Asian values, when compared to Russian debates between Pan-Slavists and Westerners, or French nineteenth century debates between those defending the Catholic-authoritarian ‘moral order’ against liberal and republican ideas, or the debates among German intellectuals in the early twentieth century between the ‘ideas of 1914’ and the ‘ideas of 1789’? Or, for that matter, Trump’s advisor Bannon fighting ‘the liberal establishment’ allying with the far right’s factions within the Vatican and finding inspiration in the fascist Catholic philosopher Julius Evola? The structure of reactionary challenges appear remarkably stable across time and space.

On the other hand there are also very few areas in the world where constitutionalist ideals have not inspired men and women to claim their rights and build political movements towards the establishment of legal and political orders or contesting existing laws and practices in the name of constitutionalist principles in order to reform them. From the beginning the appeal of the revolutionary ideals transcended ‘the West’, also triggering, for example, the Haitian Revolution – an anti-slavery, anti-colonial insurrection. The commitment to human rights, democracy and the rule of law is not a commitment to abolish or flatten national cultures, but to change national culture and identity to make it more reflexive and inclusive, opening it up to the wider world, creating more opportunity and a wider cognitive horizon, recognising difference, embracing pluralism and allowing for the contestation of structures of domination, whatever form they may take. Similarly, Global Constitutionalism is not about abolishing sovereign states, but about integrating them globally and building the appropriate legal and institutional infrastructure to empower them to better fulfil their function to respect, protect and fulfil the rights of those under their jurisdiction. It thus appears that historically both the appeal and the resistance to constitutionalism is a global phenomenon.

V. The future of global constitutionalism: Lessons from the history of Berlin

From the beginning of the year, the management of the Journal has moved to Berlin, Germany. There is something deeply appropriate about a Journal

of this name and focus to be based in Berlin. In our 2015 editorial we insisted that the history of Global Constitutionalism does not lend itself to simple progress narratives, emphasised historical contingency and insisted that the fate of Global Constitutionalism was an open question. The present tendencies of unravelling of the global order raise very serious questions indeed. There is probably no better place to become aware of the frailties and complexities of constitutional progress without giving up hope than Berlin.

Berlin was the relatively liberal Prussian rule-of-law oriented place, where Voltaire sought refuge as a guest of Frederick the Great. It is also the place where the idea of a liberal constitutional democracy in a unified Germany was buried after the failed constitutional revolution of 1848. When German unity was finally achieved in 1871 and Berlin became the capital of the new German nation-state, this was brought about by conservative, industrialist and nationalist political forces that had little connection to the constitutionalist tradition. When the deeply reactionary but subtle and gifted diplomat Bismarck stepped down in 1890 and a proud and ambitious young Emperor sought to demand a place in the sun for the new great power that Germany was becoming, it took another 24 years before the first great twentieth century dance of death began in Europe. Yet it was during this time – between 1890 and 1914 – that the basic structure of the modern city of Berlin was established, including the many ‘Altbau’ apartments that are so popular for the bourgeois bohemians who like to populate the city today. After the disaster of WWI, Berlin became the centre of avant-garde art, theatre, cinema and literature in the Weimar Republic – the vibrant capital of a frail liberal constitutional democracy, whose mainstream parties would be derided as ‘system-parties’ by the radical right and the radical left and no longer command a majority by the early 1930s. Even though the Nazis never won electoral majorities in Berlin, the city became the heart of darkness for 12 years, the centre of an evil empire that organised a global dance of death and genocidal annihilation on an industrial scale. After that nightmare which also led to the destruction of significant parts of the city, Berlin started a new troubled life as ground zero in the Cold War – the nation divided between East and West, with a wall eventually running right through the city. Today Berlin is a place that provides a distinctively German interpretation of what it means to be a cosmopolitan European. The past is very much present in a sophisticated culture of commemoration, from the remarkable Memorial of the Murdered Jews in Europe beside the Brandenburg Gate – a self-inflicted huge scar on the face of the city – to the conserved bullet-hole-riddled buildings in Mitte, to ‘Stolpersteine’ – gold-plated stones with the names of the deported etched into them and placed in the pavement in front of the building they were

deported from. Yet notwithstanding the omnipresence of the past, it does not hold hostage the vibrant present or denies the possibility of a better future. Berlin is a perennially bankrupt city ('poor but sexy', as a previous mayor insisted) that refused to shut down one of its three heavily subsidised world class operas. It is one of the few growing cities in Germany, with the highest Jewish growth rate in the world, and while it lacks the class and style associated with Paris or the presence of a globalised bourgeoisie like in London, New York, Singapore or Hong Kong, it provides Germans, Europeans and other citizens of the world with an unrivalled context for reflections on depravity, tragedy, redemption and the possibility of progress.

The history of Berlin reminds us that a commitment to human rights, democracy, and the rule of law can never be taken for granted and that political entrepreneurs are prone to exploit, with devastating consequences, publics who lose faith in them because they cannot see how their lives are protected and improved by these practices. The principles upon which GlobCon was founded need nurturing, by critically exposing false friends justifying complacency or oppression in their name, by constructively marshalling them to improve institutions and laws and to vigorously defend them against those who oppose them.

Since the last editorial was written, the Journal has seen some other changes. The institutional home of the Journal for its first five years was the Chair of Political Science especially Global Governance in collaboration with the Center for Globalisation and Governance (CGG) at the University of Hamburg, run by Antje Wiener with Sassan Gholiaghha as the Managing Editor. While Antje remains fully on board as editor, Sassan has left us to move on to other things. Furthermore Tony Lang has left us as an editor, after having assumed substantial new administrative responsibilities as Head of the School of International Relations at the University of St. Andrews. Finally Jim Tully, who has served in a central consulting role since well before the first GlobCon issue was published will be retiring from active service. We thank them all for their tireless engagement and commitment to the Journal. On the other hand we are happy to welcome Jonathan Havercroft to the editorial team and Yoon Jin Shin as the new Managing Editor of the Journal, running the Journal from the Center for Global Constitutionalism headed by Mattias Kumm at the WZB Berlin Social Science Center.